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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/036,573
Filing Date: December 31, 2001
Appellant(s): POPP ET AL.

MAILED

JUN 11 2007

Group 3700

Richard L. Bridge
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 2-14-07 appealing from the Office action mailed 8-10-06.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

Any related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal are set forth in section II of the Brief.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is deficient. 37 CFR 41.37(c)(1)(v) requires the summary of claimed subject matter to include: (1) a concise explanation of the subject matter defined in each of the independent claims involved in the appeal, referring to the specification by page and line number, and to the drawing, if any, by reference characters and (2) for each independent claim involved in the appeal and for each dependent claim argued separately, every means plus function and step plus function as permitted by 35 U.S.C. 112, sixth paragraph, must be identified and the structure, material, or acts described in the specification as corresponding to each claimed function must be set forth with reference to the specification by page and line number, and to the drawing, if any, by reference characters. The brief is deficient because as best determinable, since Appellant refers to pages and line numbers rather than amendments to pages and lines and lines of such amendments, that the portions of the specification referred to are those as originally filed yet some of those referred to portions have been subsequently amended. Also the species elected includes an inelastic backing/substrate whereas some of the portions referred to by Appellant, e.g. page 23, lines 23-27 as originally filed, disclose an elastic backing/substrate. Finally with respect to lines 4-8 of claim 28, lines 16-19 of claim 33, lines 5-8 of claims 40 and 42, see Grounds of Rejection, section (9) *infra*.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

It is noted that in ground J. "123" should be --132--.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

0 289 198	NOEL (EPO)	11-1988
97/25893	WEIRICH et al (PCT)	07-1997

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The invention and species elected are a mechanical fastening system with an inelastic stabilizer, force application without substantial necking or gathering and machine direction orientation.

Ground A:

Claims 3, 9, 28, 30-31, 33-37 and 40-43 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In regard to claims 28, 33, 40 and 42 and thereby the claims dependent therefrom, and as discussed infra in Grounds I and J infra, the description of the first fastening component is unclear, e.g. what is "oriented nonwoven loop material"? When is the claimed orientation taking place? Therefore, is the definition of the "oriented nonwoven loop material", i.e. the orientation referred to in such definition, and the claimed orientation one and the same? Different?

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Ground B:

Claims 3, 9, 28, 30-31, 33-37 and 40-43 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. See the claim terminology “oriented nonwoven loop material” and the discussion in Grounds I-J *infra* and Ground A *supra*. Where is the support for such current definition in the application as originally filed? Also, if Appellant is claiming that the oriented loop material of the fastener is further oriented, rather than the orientable material having been oriented, i.e. see the language, i.e. “in which...are oriented... by the application...web” on lines 5-8 and 17-19 in claims 28 and 33, respectively, and the language, i.e. the fibers in...being oriented by drawing...of the fibers” on lines 4-8 of claims 40 and 42, where is the support for such, especially with regard to the elected species in which the loop material is an “oriented” material connected to an inelastic substrate?

Claim Language Interpretation

In light of the discussion, i.e. lack of clarity and/or new matter (and thus MPEP 2163.06, I.), i.e. Grounds A-B *supra* and I-J *infra*, the species elected (again the invention and species elected are a mechanical fastening system with an inelastic stabilizer, force application without substantial necking or gathering, and machine direction orientation), the claim terminology, as best understood, e.g., the definitions thereof, and the claims being product by process claims (and thus also MPEP 2113, i.e. the patentability of a product by process is based on the product

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itself not the method of production (Therefore if the end product in the product by process is the same as or obvious from a product of the prior art, the product does not distinguish over the prior art even though the prior product was made by a different process)), the first fastening component of claims 3, 9 and 28, 30-31 and 33-37, i.e. the end product, will be considered an oriented nonwoven loop material secured to a substrate which comprises a nonwoven web of fibers with more of the fibers, i.e. at least greater than 50%, e.g. 100%, generally parallel to a direction or, in other words, the first fastening component can be a nonwoven loop material comprising a nonwoven web of fibers generally parallel fibers to a direction. Note *Arvin Industries v. Berns Air Corp*, 525 F2d. 182, 188 USPQ 49 (CCA 7-1975) with respect to the terminology “generally”. It is still noted that regardless of whether the claim is a product by process claim or not, the claims do not require the loop material web be applied to the substrate in an extended/tensioned configuration. It is also noted that the number of direction oriented fibers of the orientable material nor which direction “a direction” is with respect to the end product is claimed. Claim 30 is interpreted as claiming a substrate integral with an article. Claim 35 is interpreted to claim the substrate integrally with just the one article of claim 33. The terminology of claims 40-43 which is similar to that of claims 3, 9 and 28, 30-31, and 33-37 will be interpreted the same as discussed supra.

Grounds C and D:

Claims 3, 9, 28, 30-31, 33-37 and 40-43 are rejected under 35 U.S.C. 102(b) as being anticipated by (Ground C), or in the alternative, under 35 USC 103(a) as obvious over Procter & Gamble, EP ‘198 (Ground D).

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Claim 28: See, e.g., Claim Language Interpretation section supra, Figures 1-3, 10, col. 3, lines 4-18, col. 4, lines 4-14, col. 6, lines 2-10, col. 8, lines 1-34, col. 9, lines 21-42, col. 13, lines 25-30, col. 14, lines 30-36 and col. 15, lines 29-41, i.e. the mechanical fastening system is 50 and has a first fastening component 20 of oriented nonwoven loop material 30 attached to a substrate, e.g., 22 and a second fastening component 52 of hook material. The fastening components are refastenable. The oriented nonwoven loop material, i.e. 30, can be a nonwoven web of fibers having generally parallel fibers in a direction. This claim as interpreted includes a product by process. The patentability of such claim is based on the product itself not the method of production. Therefore if the end product in the product by process claim is the same as or obvious from a product of the prior art, the claim does not distinguish over the prior art even though the prior product was made by a different process. See MPEP 2113. Also see the Claim Language Interpretation section supra. The end product, as best understood, is the same as or obvious from the product of '198, see cited portions supra.

Claim 3: see Figure 1, col. 5, lines 4-21, i.e. at least one axis, i.e. axes are MD and CD and col. 6, lines 2-5.

Claim 9: see col. 8, lines 30-31.

Claim 34: see portions cited supra, e.g. col. 9, lines 21-42, i.e. fibers are essentially parallel and can be tensioned without dislocation, disarrangement, skewing, etc. or untensioned, i.e. the nonwoven web is free from substantial necking and gathering. It is noted that the claim does not set forth when such freedom exists, i.e. before attachment, after attachment, before drawing, etc.

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Claim 30: it is noted that “integrally” does not require monolithic formation. See col. 14, line 50-col. 15, line 4.

Claim 31: see col. 12, last line-col. 13, line 3. It is noted that the claim does not require direct attachment to the inelastic substrate.

Claims 33-37: see discussion of claims 3, 9, 28, 30-31 and 34 supra and col. 14, line 50-col. 15, line 4.

Claims 40-43: see discussion of claims supra.

Grounds E and F:

Claims 3, 9, 28, 30-31, 33-37 and 40-43 are rejected under 35 U.S.C. 102(b) as anticipated by (Ground E) or, in the alternative, under 35 U.S.C. 103(a) as obvious over Procter & Gamble PCT ‘893 (Ground F).

Claim 28: See, e.g., Claim Language Interpretation section, Figures 1-8, page 4, lines 12 et seq, page 6, lines 4-7, page 7, lines 9-10, 13-15 and 21-23, page 8, lines 1-19, page 12, lines 8-9, page 13, lines 1-3, page 15, lines 13 et seq, i.e. the mechanical fastening system is 20 and has a first fastening component 22 of oriented nonwoven loop material 30 attached to a substrate, e.g., 34 and a second fastening component 24 of hook material 28. The fastening components are refastenable. The oriented nonwoven loop material, i.e. 30, can be a nonwoven web of fibers having generally parallel fibers in a direction, i.e. “essentially parallel” in a direction. This claim as interpreted includes a product by process. The patentability of such claim is based on the product itself not the method of production. Therefore if the end product in the product by process claim is the same as or obvious from a product of the prior art, the claim does not

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distinguish over the prior art even though the prior product was made by a different process. See MPEP 2113. The end product, as best understood, is the same as or obvious from the product of '893, see cited portions supra.

Claim 3: see page 8, lines 1-7, page 15, lines 23 et seq, and page 19, lines 9-15.

Therefore since the '893 device can include filaments 36 positioned in any direction, which includes a machine direction of the web, the '893 device is considered to meet the language of the claims.

Claim 9: see page 13, lines 1-3.

Claim 34: see portions cited supra, i.e. fibers are essentially parallel and can be tensioned without dislocation, disarrangement, skewing, etc. or untensioned, i.e. the nonwoven web is free from substantial necking and gathering. It is noted that the claim does not set forth when such freedom exists, i.e. before attachment, after attachment, before drawing, etc.

Claim 30: it is noted that "integrally" does not require monolithic formation. See page 18, lines 28-33.

Claim 31: see page 10, lines 7-10 and page 26, lines 24-26, i.e. the second lamina 80 is inelastic and if attached to composite 90 when it is completely relaxed, the composite 90 is inelastic. It is noted that the claim does not require direct attachment to the inelastic substrate.

Claims 33-37: see discussion of claims 3, 9, 28, 30-31 and 34 supra, and page 18, lines 28-33.

Claims 40-43: see discussion of claims supra.

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Ground G:

The drawings are objected to because a Figure 9c should be provided. See discussion *infra* in Grounds H-J and *supra* in Grounds A-B. Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as “amended.” If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either “Replacement Sheet” or “New Sheet” pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Ground H:

The drawings were received on 11-25-05. These drawings are approved in part by the Examiner. Figures 1-9b are approved. Figure 9c was not approved because it does not show the “oriented material”, see detailed discussion in Grounds I-J *infra* and Grounds A-B *supra*.

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Ground I:

The disclosure is objected to because of the following informalities: the application as filed included definitions of the terms “nonwoven”, “nonwoven web” and “oriented material”, see page 8, lines 12-13 and page 9, lines 16-18 as originally filed. In light of these definitions the meaning of the term “oriented non-woven loop material” would be materials and webs of material formed without the aid of a textile weaving or knitting process in which mechanical drawing of the material has resulted in the alignment of the fibers constituting the material in a direction generally parallel to the direction of applied force (See the discussion of the terminology “generally” in the Claim Language Interpretation section *infra*, i.e. citing *Arvin Industries v. Berns Air Corp*, 525 F.2d 182, 188 USPQ 49 (CCA 7-1975): “While it is true, as plaintiff points out, that “generally” and other similar words are sometimes construed liberally to avoid unduly restricting a patent claim, see, e.g., *Kolene Corp. v. Motor City Metal Treating, Inc.*, 307 F.Supp. 1251, 163 USPQ 214 (E.D. Mich. 1969), *aff’d*, 440 F.2d 77, 169 USPQ 77 (6th Cir. 1971), *cert. denied*, 404 U.S. 886, 171 USPQ 325 (1971), the imprecision of such a word cannot be allowed to negate the meaning of the words it modifies. The use of the modifier “generally” in the context of Claim 9, we think, was intended to allow for irregular deviations from a perfectly flat surface and not to broaden the scope of “planar” to encompass surfaces which are distinctly arcuate by design.”). Thus mechanical drawing of a nonwoven material results in alignment/realignment of more than one fiber of the material generally parallel to the direction of applied force. The application as filed also disclosed in the paragraph bridging pages 27-28, especially page 27, lines 8-10 that a nonwoven, i.e. an orientable material, can be drawn between two nips to “orient” the material, i.e. produce an “oriented material”. The

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invention and species elected by Appellant include a mechanical fastening system with an inelastic stabilizer, force application without substantial necking or gathering, and machine direction orientation. Therefore, in addition to the portions cited supra, attention is also invited to the application as filed at the paragraph bridging pages 29-30, especially page 30, lines 4-6, i.e. an “oriented” material attached to an inelastic substrate/stabilizer results in a inelastic loop material.

The amendment filed 11-14-05 added a definition of “oriented nonwoven loop material” at page 9 and a description of proposed Figure 9c at page 5 and page 27 which are, at best, see also discussion/rejections in Ground A supra, inconsistent with the application as filed, i.e. the description of the fastening system is unclear/inconsistent. Such definition of “oriented nonwoven loop material” now added to page 9 does not require the number of fibers oriented in the direction of an applied force due to application of such force, whether it is two fibers or more than two fibers, be oriented generally parallel in that direction. The definition sets forth that more fibers of the web are generally parallel to a direction corresponding to a direction of a force applied and that more fibers are oriented, i.e. realigned/altered, in such direction after the application of such force than before, but of such realigned/altered fibers none are necessarily required to be realigned/altered generally parallel to the direction of applied force, i.e. the “orientable” material and “oriented” material could have the same number of generally parallel fibers as long as there are more generally parallel fibers than not generally parallel fibers. The descriptions of Figure 9c also set forth such realigned fibers, i.e. don’t require more of such fibers be parallel after the application of than before the application of force, merely more are aligned in the direction of force. The lack of clarity/inconsistency is exacerbated by the

Appellant's arguments bridging pages 7-9 of the 11-14-05 response and the Durrance declaration, last paragraph of section 4, of 6-20-05 (attached as part of the Evidence Appendix of the Appeal Brief) which discuss Figures and descriptions thereof, e.g., Figure 9b, which appear to be inconsistent with such Figures and descriptions thereof added by the 11-14-05 amendment. The claims also appear, see discussion in Ground A supra, to be inconsistent with either definition of "oriented nonwoven loop material", i.e. that as filed or as added by the 11-14-05 amendment, further exacerbating the confusion. Specifically, the claims set forth "oriented nonwoven loop material" but regardless of which definition is used with regard thereto, the claims also appear to require the oriented, not orientable, nonwoven loop material of the fastener include a web of fibers in which a greater number of fibers are, not previously were, oriented in a direction by the application of a force in such direction to the web, i.e. there seems to be more than one orientation of fibers being claimed including one in which the loop material is attached to the substrate, i.e. is the fastener. However, Appellant's attention is reinvited to the discussion supra in which the substrate elected is inelastic and page 30, lines 4-6, i.e. in the elected species, the "oriented" material once connected to the inelastic substrate is no longer extensible, i.e. not capable of further orientation. Therefore, a clear, consistent description of the fastening system should be set forth, i.e. what does the terminology "oriented nonwoven loop material" encompass? How many times is the material "oriented"? Once from an orientable material to an oriented material? Twice from a thus oriented material to a twice oriented material? How many fibers of those aligned/realigned extend generally parallel? Does the number of fibers aligned in a specific direction keep increasing every time there is a reorientation? How does such occur if

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the substrate to which the loop material is attached is inelastic? Appropriate correction is required.

Ground J:

The amendment filed 11-14-05 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: the amendment to page 5, third paragraph thereof, to page 9, line 11 and to page 27, line 8, lines 8 et seq thereof.

Applicant is required to cancel the new matter in the reply to this Office Action.

See discussion of the new definition of the term “oriented nonwoven loop material” and the descriptions of Figure 9c with regard to the application as filed in Ground I above. Therefore, regardless of the number of fibers realigned/altered, at worst, where is the support for the definition of “oriented nonwoven loop material” now added to page 9 and the descriptions of Figure 9c? The Durrance declaration of 6-20-05 has been reconsidered but not only is such declaration not consistent with the changes made as discussed supra, but such is not deemed persuasive with respect to support for the amendments because it does not set forth that the one of ordinary skill in the art would have understood such definitions/descriptions as argued when interpreted in light of the specification as filed, i.e. the definition of “oriented material” on page 9 as originally filed.

(10) Response to Argument**Ground A:**

Claims 3, 9, 28, 30 and 31:

Appellant's arguments on pages 6-11 of the Brief with regard to claim 28, and particularly the language "oriented nonwoven loop material" being clear by reference to various portions of the specification and the Durrance declaration (It is noted that such arguments are substantially similar to those set forth with regard to Ground I infra), and the nonoriginal claim language of claim 28 and the definition of "oriented nonwoven loop material" added to page 9, line 11 on 11-15-05 being consistent, have been considered but are deemed not persuasive in view of the basis set forth in section (9), Ground A, supra, by the Examiner, and thereby Grounds I and J supra, especially the basis provided by the explicit definition of "oriented material" as originally filed which neither Appellant's arguments nor the Durrance declaration address and in light of which the original claims were interpreted (It is noted that while Appellant discusses such claims, the explicit definition of the language therein is not), and the language of the present claim 28 not only compared to such original explicit definition but also the present definition at page 9, line 11. Note for example that claim 28 as now presented sets forth an oriented nonwoven material comprising a nonwoven web of fibers in which a greater number of fibers are oriented in a selected direction by the application of a force in the selected direction to extend the web not were oriented in a selected direction by the application of a force in the selected direction extending the web.

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Claims 33-37:

Appellant's arguments on pages 11-12, i.e. the same reasons as set forth with respect to claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claim 28 supra.

Claims 40-41:

Appellant's arguments on pages 12-13, i.e. the same reasons as set forth with respect to claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claim 28 supra.

Claims 42-43:

Appellant's arguments on pages 13-14, i.e. the same reasons as set forth with respect to claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claim 28, supra.

Therefore, the rejection of claims 3, 9, 28, 30-31, 33-37 and 40-43 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention is deemed proper and maintained.

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Ground B:

Claims 3, 9, 28, 30 and 31:

Appellant's remarks on pages 14-16 with regard to claim 28, and particularly the language "oriented nonwoven loop material" being supported by reference to various portions of the specification have been considered but are deemed not persuasive in view of the basis set forth in section (9), Ground B, supra, by the Examiner, and thereby Grounds A, I and J supra, especially the basis provided by the explicit definition of "oriented material" as originally filed which Appellant's arguments do not address and in light of which the portions of the original specification and claims claims were interpreted (It is noted that while Appellant discusses such claims, the explicit definition of the language therein is not), and the language of the present claim 28 not only compared to such original explicit definition but also the present definition at page 9, line 11. Note for example that claim 28 as now presented sets forth an oriented nonwoven material comprising a nonwoven web of fibers in which a greater number of fibers are oriented in a selected direction by the application of a force in the selected direction to extend the web not were oriented in a selected direction by the application of a force in the selected direction extending the web.

Claims 33-37:

Appellant's arguments on page 16, i.e. the same reasons as set forth with respect to claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claim 28 supra.

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Claims 40-41:

Appellant's arguments on pages 16-17, i.e. the same reasons as set forth with respect to claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claim 28, supra.

Claims 42-43:

Appellant's arguments on page 17, i.e. the same reasons as set forth with respect to claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claim 28.

Therefore the rejection of claims 3, 9, 28, 30-31, 33-37 and 40-43 under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement is deemed proper and maintained.

Ground C:

Claims 3, 9, 28, 30 and 31:

Appellant's remarks on pages 17-21 regarding the product by process terminology, i.e. the structure imparted by such process which distinguishes the end product structure from that of the prior art and the rejections alleged confusion of the claimed structure with regard to the prior art structure such remarks have been considered but are deemed not persuasive in that they are narrower than the claim language, as best understood, discussed supra, and the teachings of the prior art as applied by the prior art rejection supra. Attention is again invited to the discussion of

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product by process claims, see Ground C and the Claim Language Interpretation section supra i.e. patentability is determined upon the structure of the end product, and the specific portions of the references cited. Appellant has not set forth how the process of making the now claimed product, as best understood, has imparted some structure to the end product which distinguishes over that, i.e. the end product, of the prior art. Appellant argues a distinction based on the greater number of fibers being oriented in a direction by the application of force to extend the web. See page 20, second full paragraph and page 21, first full paragraph of the Brief.

However, the number of fibers so argued is relative to a starter material. The issue is whether the end product is the same as the prior art, see Claim Language Interpretation section supra (i.e. the end product, will be considered an oriented nonwoven loop material secured to a substrate which comprises a nonwoven web of fibers with more of the fibers, i.e. at least greater than 50%, e.g. 100%, generally parallel to a direction or, in other words, the first fastening component can be a nonwoven loop material comprising a nonwoven web of fibers generally parallel fibers to a direction. ". It is still noted that regardless of whether the claim is a product by process claim or not, the claims do not require the loop material web be applied to the substrate in an extended/tensioned configuration. It is also noted that the number of direction oriented fibers of the orientable material nor which direction "a direction" is with respect to the end product is claimed. Claim 30 is interpreted as claiming a substrate integral with an article. Claim 35 is interpreted to claim the substrate integrally with just the one article of claim 33. The terminology of claims 40-43 which is similar to that of claims 3, 9 and 28, 30-31, and 33-37 will be interpreted the same as discussed supra.) As properly set forth in the prior art rejection supra,

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i.e. there is no confusion, note the cited portions, especially col. 9, lines 10-17, the nonwoven web of fibers of the loop material of the end product of the prior art is the same as that claimed.

Claims 33-37:

Appellant's arguments on page 22, i.e. the same reasons as set forth with respect to claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claim 28, supra.

Claims 40-41:

Appellant's arguments on pages 22-23, i.e. the same reasons as set forth with respect to claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claim 28, supra.

Claims 42-43:

Appellant's arguments on page 23, i.e. the same reasons as set forth with respect to claim 40, and thereby claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claims 28 and 40 supra.

Therefore the rejection of claims 3, 9, 28, 30-31, 33-37 and 40-43 are rejected under 35 U.S.C. 102(b) as being anticipated by Procter & Gamble, EP '198 is deemed proper and maintained.

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Ground D:

Claims 3, 9, 28, 30 and 31:

Appellant's arguments on pages 23-25 arguing substantially the same reasons as those set forth in Ground C plus lack of motivation have been considered but are deemed not persuasive for the reasons set forth supra in Ground C, the Claim Language Interpretation section supra, and thereby MPEP 2113 as well which sets forth:

THE USE OF 35 U.S.C. 102 /103 REJECTIONS FOR PRODUCT-BY-PROCESS CLAIMS HAS BEEN APPROVED BY THE COURTS

“[T]he lack of physical description in a product-by-process claim makes determination of the patentability of the claim more difficult, since in spite of the fact that the claim may recite only process limitations, it is the patentability of the product claimed and not of the recited process steps which must be established. We are therefore of the opinion that when the prior art discloses a product which reasonably appears to be either identical with or only slightly different than a product claimed in a product-by-process claim, a rejection based alternatively on either section 102 or section 103 of the statute is eminently fair and acceptable. As a practical matter, the Patent Office is not equipped to manufacture products by the myriad of processes put before it and then obtain prior art products and make physical comparisons therewith.” In re Brown, 459 F.2d 531, 535, 173 USPQ 685, 688 (CCPA 1972). (emphasis added)

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Claims 33-37:

Appellant's arguments on page 25, i.e. the same reasons as set forth with respect to claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claim 28 supra.

Claims 40-41:

Appellant's arguments on page 26, i.e. the same reasons as set forth with respect to claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claim 28, supra.

Claims 42-43:

Appellant's arguments on page 23, i.e. the same reasons as set forth with respect to claim 40, and thereby claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claims 28 and 40 supra.

Therefore the rejection of claims 3, 9, 28, 30-31, 33-37 and 40-43 under 35 USC 103(a) as obvious over Procter & Gamble, EP '198 is deemed proper and maintained.

Ground E:

Claims 3, 9, 28, 30 and 31:

Appellant's arguments on pages 27-28 with regard to Weirich lacking the same teachings that Noel does, i.e. fails to show or suggest a nonwoven loop material comprising a nonwoven

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web of fibers in which a greater number of fibers are oriented in a selected direction by the application of a force in a selected direction to extend the web, have been considered but are deemed not persuasive for the same reasons as set forth with regard to Noel, see Ground C supra, i.e. the nonwoven web of fibers of the loop material of the end product of the prior art is the same as that claimed in these product by process claims.

Claims 33-37:

Appellant's arguments on page 28, i.e. the same reasons as set forth with respect to claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claim 28, supra.

Claims 40-41:

Appellant's arguments on page 29, i.e. the same reasons as set forth with respect to claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claim 28, supra.

Claims 42-43:

Appellant's arguments on page 29, i.e. the same reasons as set forth with respect to claim 40, and thereby claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claims 28 and 40 supra.

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Therefore, the rejection of claims 3, 9, 28, 30-31, 33-37 and 40-43 under 35 U.S.C. 102(b) as anticipated by Procter & Gamble PCT '893 is deemed proper and maintained.

Ground F:

Claims 3, 9, 28, 30 and 31:

Appellant's arguments on page 30 arguing substantially the same reasons as those set forth in Ground E plus lack of motivation have been considered but are deemed not persuasive for the reasons set forth supra in Ground E, the Claim Language Interpretation section supra, and thereby MPEP 2113 as well which sets forth:

THE USE OF 35 U.S.C. 102 /103 REJECTIONS FOR PRODUCT-BY-PROCESS CLAIMS HAS BEEN APPROVED BY THE COURTS

“[T]he lack of physical description in a product-by-process claim makes determination of the patentability of the claim more difficult, since in spite of the fact that the claim may recite only process limitations, it is the patentability of the product claimed and not of the recited process steps which must be established. We are therefore of the opinion that when the prior art discloses a product which reasonably appears to be either identical with or only slightly different than a product claimed in a product-by-process claim, a rejection based alternatively on either section 102 or section 103 of the statute is eminently fair and acceptable. As a practical matter, the Patent Office is not equipped to manufacture products by the myriad of processes put before it and then obtain prior art products and make physical comparisons therewith.” In re Brown, 459 F.2d 531, 535, 173 USPQ 685, 688 (CCPA 1972). (emphasis added)

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Claims 33-37:

Appellant's arguments on page 31, i.e. the same reasons as set forth with respect to claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claim 28, supra.

Claims 40-41:

Appellant's arguments on page 31, i.e. the same reasons as set forth with respect to claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claim 28, supra.

Claims 42-43:

Appellant's arguments on pages 31-32, i.e. the same reasons as set forth with respect to claim 40, and thereby claim 28, have been considered but are deemed not persuasive for the same reasons as set forth with respect to claims 28 and 40 supra.

Therefore the rejection of claims 3, 9, 28, 30-31, 33-37 and 40-43 35 U.S.C. 103(a) as obvious over Procter & Gamble PCT '893 is deemed proper and maintained.

Ground G:

Appellant's arguments on page 32 have been considered but are deemed not persuasive because such are not commensurate in scope with the objection, i.e. for all the reasons set forth

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in Ground G in Section (9), supra, i.e. “See discussion infra in Grounds H-J and supra in Grounds A-B.”

Therefore the drawing objection is deemed proper and maintained.

Ground H:

Appellant’s arguments on pages 32-34 have been considered but are deemed not persuasive because such are not commensurate in scope with the reasons for non-entry, i.e. for all the reasons set forth in Ground H in Section (9), supra, i.e. “Figure 9c was not approved because it does not show the “oriented material”, see detailed discussion in Grounds I-J infra and discussion in Grounds A-B supra.” See the discussion in this section infra with regard to Grounds I and J and supra with regard to Grounds A and B.

Therefore, the lack of approval of Figure 9c is deemed proper and maintained.

Ground I:

Appellant’s arguments on pages 35-39 of the Brief with regard to the specification clearly providing for the meaning of the terminology “oriented material” as added to page 9, line 11 on 11-15-05 by reference to various portions of the specification, the original claims and the Durrance declaration and the lack of basis provided by the Examiner for the position taken have been considered but are deemed not persuasive in view of the basis set forth in section (9), Ground I, supra, by the Examiner, especially the basis provided by the explicit definition of “oriented material” as originally filed which Appellant’s arguments nor the Durrance declaration address and in light of which the original claims were interpreted (It is noted that while

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Appellant discusses such claims, such explicit definition of the language therein is not), the language of the present claims as compared to the original claim now.

Therefore the objection to the description is deemed proper and is maintained.

Ground J:

Appellant's argument on page 39 with regard to the description of Figure 9c and the definition of the terminology "oriented nonwoven loop material" being supported by the originally filed specification due to the ample support indicated in great detail in the prior grounds have been considered but are deemed not persuasive for the reasons set forth in the Grounds of Rejection, Section (9), supra, as well as the response to arguments in the prior Grounds in this section, i.e. "the ample support indicated in the prior grounds".

Therefore the objection to the amendment filed 11-14-05 under 35 U.S.C. 132(a) because it introduces new matter into the disclosure is deemed proper and maintained.

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(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

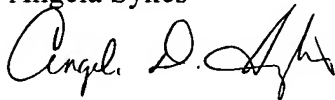
Respectfully submitted,

K. M. Reichle



Conferees:

Angela Sykes



TATYANA ZALUKAEVA
SUPERVISORY PRIMARY EXAMINER

Tanya Zalukaeva

